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No. 151

IN THE

Supreme Court of the United States

PIERCE OIL CORPORATION, Appellant

v.

LUTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS, ET AL., Appellees

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT

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Solicitor for Appellant.

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LIST OF AUTHORITIES CITED

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STATEMENT.

This is a suit instituted in the United States District Court for the Western District of Arkansas by the appellant against the appellees seeking to have Act Number 606 of the General Assembly of the State of Arkansas of 1921 declared inoperative and void so far as it affects the appellant.

The appellant, the Pierce Oil Corporation, alleged in its complaint that it was a corporation organized under the laws of the State of Virginia and authorized to do business in the State of Arkansas, and was engaged in producing, refining and selling gasoline and other petroleum products and that in the course of such business it has sold and is selling in the State of Arkansas large quantities of gasoline to wholesalers as well as consumers.

That the appellees were officers of Sebastian County, Arkansas, and entrusted with the enforcement of Act No. 606 of the General Assembly of Arkansas for 1921, approved March 3, 1921; that said act was in violation of, and repugnant to, the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of its property without due process of law, in that without its consent and without just compensation said act makes appellant liable for the debts of another and subject to punishment by fine for the acts of another committed without appellant's connivance, consent, participation or control; and in that said act deprives appellant of its property and appropriates the same for public use without just compensation; that said act is repugnant to Section 23, Article II, of the Constitution of the State of Arkansas, in that said act delegates to appellant power to levy and collect a tax; that said act is repugnant to Section 16, Article V, of the Constitution of the State of Arkansas, in that said act levies an arbitrary tax upon property and not according to its value; and that said act is void for the reason that it requires the seller of gasoline to collect a tax on all gasoline sold to purchasers for the purpose mentioned in the act, without providing any method or means by which the seller may determine how said gasoline is to be used, and further, because it makes the seller the collector of the tax and both civilly and criminally liable for the same without providing any method by which the seller of gasoline may enforce the collection of said tax; and that said act is in violation of Article II, Section 18, of the Constitution of Arkansas, in that it grants an immunity to citizens and classes of citizens, which, upon the same terms is not granted to all citizens (Tr., pp. 2-6).

Appellees filed demurrer and response alleging that appellant's petition did not state facts sufficient to entitle it to the relief prayed for and stating that said act levied a privilege tax instead of a property tax and denying said act was in violation of either the Constitution of the State of Arkansas or the Constitution of the United States and attaching to said demurrer and response a copy of Act No. 606, approved March 3, 1921 (Tr., pp. 6-11).

The cause was submitted upon the petition of the appellant, the demurrer, response, and exhibits of the appellees and a stipulation that it cost the appellant, the Pierce Oil Corporation, approximately six hundred ($600.00) dollars per month to file the reports, collect the tax and remit the same as required by said act.

The court found that Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, was not a property tax, but a privilege tax and as such was not repugnant to either the Constitution of Arkansas or the United States and denied appellant's petition for a writ of injunction restraining the appellees from the collection of said tax (Tr., pp. 11-12).

Whereupon, the appellant duly prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, where said cause was duly heard and the judgment and decree of the United States District Court for the Western District of Arkansas was affirmed; and an appeal has been duly prosecuted to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that Act No. 606 of the General Assembly of the State of Arkansas, approved March 3, 1921, was a privilege tax and that the privilege was the privilege of selling gasoline.

2. The court erred in holding that said act made it a privilege to operate automobiles on the highways of Arkansas.

3. The court erred in holding that the tax was not levied against the purchaser of gasoline but was levied against the seller of gasoline.

4. The court erred in not holding said act in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in finding that the tax provided for in Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, is not a property tax.

6. The court erred in finding that the tax provided for in said act is a privilege tax.

7. The court erred in deciding that said act and said tax are not repugnant to either the Constitution of Arkansas or the Constitution of the United States.

8. The court erred in denying the prayer of petitioner's petition for a writ of injunction restraining defendants from collecting said tax.

9. The court erred in not granting the prayer for injunction as prayed for in petitioner's petition.

ANALYSIS OF ACT.

The title to Act No. 606 is as follows:

"AN ACT TO LEVY A TAX UPON GASOLINE USED IN THE PROPELLING OF MOTOR VEHICLES AND FOR OTHER PURPOSES."

Section One of the Act provides:

> "All persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines, over the highways of this State, shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1c) per gallon for each gallon so sold."

Section Two of the act provides that the seller of such gasoline or other products shall register with the county clerk of the county in which said seller is engaged in business, and that on or before the tenth day of each month said seller shall file with the county clerk of the county in which said seller is doing business, a complete, itemized and verified statement showing the sales of such gasoline, kerosene or other products to purchasers using the same for propelling motor vehicles, for the calendar month next preceding said statement; that said statement shall show the amount of tax due by said seller upon such sales; that said seller shall pay at once into the county treasury the amount of tax shown to be due by said statement.

Section Three of the act provides that if any such seller shall fail to collect the tax provided for in Section 1, he shall be personally liable for the amount of such tax so uncollected.

Section Four of the act provides that the seller shall file with the county clerk of each county in which he shall have made a sale during the preceding month, a verified statement showing the amount of gasoline, kerosene and other products suitable for use for the propelling of motor vehicles, sold by him to each retailer within each county, during the calendar month preceding.

Section Five of the act provides that one-half of the tax required by the act shall go to the county where the sale of the gasoline or other products was made, and the other one-half shall be paid to the Treasurer of the State of Arkansas, to the credit of the Highway Improvement Fund.

Section Six of the act makes it a misdemeanor punishable by a fine of not less than ten dollars nor more than one thousand dollars for the seller to fail to file the statements required in the act or to fail to account for all money due by seller under the terms and provisions of the act, and that the amount of the tax due and unpaid by the seller shall be recovered by the prosecuting attorney for the district, in the name of the State of Arkansas, by civil action.

Section Seven of the act declares an emergency and makes the statute take effect on and after April 1, 1921.

THE ACT IS VOID FOR THE FOLLOWING REASONS:

I.

Because the act is so uncertain, indefinite and unenforceable as to be void.

II.

Because the act violates the due process of law clauses of the State and Federal Constitutions.

III.

Because the act is an arbitrary and unreasonable discrimination against certain citizens or classes of citizens.

UNCERTAINTY.

By the terms of the act it will be seen that the seller must collect or pay one cent a gallon for all gasoline sold by him to be used by the purchaser in internal combustible type engines in motor vehicles using the highways of the State. Impliedly, the consumer can not, and must not collect, and does not have to pay, any tax upon gasoline sold by him for any other purpose or to any other person than those mentioned in the act. If the vendor sells gasoline to a person to be used by him *in* combustible type engines in motor vehicles using the highways, he must collect the one cent a gallon or he himself becomes liable therefor, and whether he collects or not he must account to the county treasurer each month for the tax of one cent a gallon on each gallon sold by him during the preceding month to be used in combustible type engines on the highways. If he does not account for this tax, and the whole tax provided for, he is subject to a fine of from ten dollars to one thousand dollars. The test of whether he must collect, pay or account for the tax is the future use of the gasoline sold. Each time he sells gasoline he must ascertain at his peril whether the gasoline is to be used by the purchaser in the kinds of engines specified. But how shall the seller obtain this information? He must rely solely upon the information furnished by the purchaser, but

the purchaser incurs no penalty or disfavor in the eyes of the law if he misrepresents the future use of the gasoline. It may be that the purchaser does not know what he will in the future do with the gasoline, yet the seller must ascertain this fact or he will be punished if the minions of the law learn he has not obtained this information. The statute gives the seller no possible way of obtaining this information in order to protect himself from future criminal prosecution. Let us take a hypothetical case: A negotiates with B for the purchase of gasoline. B, the seller, must know first whether A is to use the gasoline himself or not, for any purpose. A may be buying it for personal use or for resale; if for resale no tax is due, whether to be used in combustible type engines or not. If A is to use the gasoline himself, B must ascertain what part of the gasoline will be used in combustible type engines on the highways. If A is buying the gasoline to be partly used in automobiles over the highways and partly in stationary engines, and partly in farm tractors, it would be utterly impossible, we apprehend, for A to know just how much of the gasoline would be subject to the tax under this act, but how much more difficult would it be for B to understand how much tax to collect. Again, A may live on the borders of the State and buy gasoline in Arkansas to be used partly in combustible type engines on the roads of Arkansas and partly in combustible type engines using the roads in other States. How can he then tell what part will be used in Arkansas and what part in another State? A tax would be due on the part used in Arkansas, and not on the part used elsewhere, but it makes little difference to A, the purchaser, what the gasoline is to be used for or in what kind of engines it is to be used, for he incurs no disfavor in the eyes of the law, is subject to no penalty for misinformation or uncertainty as to the use of gasoline, yet the seller must at his peril find out these things or he will be subject to criminal prosecution.

Under this statute it is impossible for the seller to ascertain upon any given sale of gasoline whether he will be subject to criminal prosecution for not collecting or paying the tax thereon? Is it possible for him to protect himself from criminal prosecution? Is it possible for him to do anything to determine whether his act is criminal or not? Does the statute contain

that degree of definiteness and certainty required of all laws, and particularly penal laws?

There was a time when laws were secret, when their terms were kept from those who were required to obey them, and under them a man might be punished for violating a law which he never heard of and which has been purposely kept from him. He had no opportunity to avoid doing the act it was a crime to do. That day is past. The spirit of the law now is to give the widest possible publicity to laws in order that those to whom they are applicable may understand their terms and do or avoid doing those things provided for in the laws. Along with the abolition of secret laws, grew up the doctrine that law must be certain and definite, so definite that those to whom it is applicable may know in advance whether a given act is criminal or not criminal. Or as was stated in the case of Tozier v. U. S., 52 Fed. 917:

> "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not * * *."

There must be some definiteness and certainty, as was said in R. R. Co. v. Dey, 35 Fed. 876:

> "In Dwar St. 652, it is laid down, 'that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters * * *.'
>
> "Lieb. Herm. 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows:
>
> " 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, thought not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.'
>
> "There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

Or as was said in U. S. v. Brewer, 11 Sup. Ct. Rep. 541:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In Succession of Pizzati (La.), 75 So., at page 508, in declaring a statute for adoption in Louisiana void because no mode was prescribed in the statute for carrying out the adoption, the court applied the doctrine of "*Ubi jus incertum, ibi jus nullum.*"

In Griffin v. State (Texas), 218 S. W. 494, the statute provided that it should be unlawful for any person to operate an automobile at night upon the public highways of the State, whose front lamps should project *a light of such brilliancy as to seriously interfere with the sight of or temporarily blind the vision of the driver of a vehicle approaching from an opposite direction.* The Supreme Court of Texas declared this statute to be so uncertain and indefinite as to be void. The court said on page 494:

> "Before a law, especially one penal in its nature, can be upheld and enforced, there should be some certain standard by which a person could determine in advance whether or not he is complying with the same. But, under this statute, there is no definite legal standard by which he can be guided, but the statute leaves to the driver of the vehicle approaching from the opposite direction, the determination as to whether his right is so seriously interferred with or his vision so temporarily blinded as to constitute the person using said lamps guilty of a violation of a law of the State of Texas, for which he should be punished. The determining factor of the guilt or innocence of the accused is to be determined by the effect of the light upon the vision upon each individual driver of a vehicle in the opposite direction."

In concluding the court said:

"That the statute is commendable in purpose, that it strikes at an annoying evil, is not to be questioned; but its terms are so vague that we are constrained to hold that, under the principles obtaining in the framing of criminal statutes, it is inoperative and unenforceable, as denouncing a crime. It is therefore ordered that the judgment be reversed and the prosecution dismissed."

The whole doctrine is summarized in Black on Interpretation of Laws, page 99, as follows:

"It is an ancient and well known maxim of the law that, *Lex non cogit ad impossibilia*,' or, as is often expressed, '*lex non intendit aliquid impossible*,' and these maxims are declared to be applicable in the construction of statutes. 'The law itself,' said an English court, 'and the administration of it, must yield to that to which everything must bend—to necessity. The law, in its most positive peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration of law must adopt that general exception in the consideration of all particular cases * * *. Hence if a statute apparently *requires the performance of things which can not be performed*, or apparently bases its commands upon the assumption of an impossible state of affairs, the court will seek for some interpretation by its terms, not too strained or fantastic, which will avoid these results * * *. If the Legislature does require an impossibility in language too plain to be mistaken or to be explained away, the act will simply be rendered inoperative thereby, and it becomes the duty of the court to pronounce accordingly."

In Potter v. Douglas County, 87 Mo. 239, the Constitution of Missouri provided that no county should become indebted in any amount exceeding in any one year the income provided for such year, without the assent of two-thirds of the qualified voters thereof, voting in an election to be held for that purpose. An act of the Legislature made it a penalty for the sheriff or jailer of any county to refuse to accept prisoners from other

counties where there were no jails or insufficient ones, or for failure safely to keep, maintain and feed such prisoners, or carry them back to the county committing them for trial. The sheriff of Greene County, Missouri, under this statute, was forced to take some prisoners from Potter County. He safely kept and maintained them and carried them to Potter County for trial, for which he rendered a bill for $459.00 to Potter County. Payment of the bill was refused and suit brought thereon. The court held that the constitutional provision was so vague, indefinite and impossible of application that it was void, and said on page 242:

> "The maxim of '*lex non cogit ad impossibilia,*' may possibly be invoked in the present case—a maxim invocable whether the law be statutory or organic."

There are many other authorities on this phase of the case, but we do not deem it necessary to discuss them or quote from them at greater length. Sutherland on Statutory Construction, page 141; Cook v. State (Ind.), 59 N. E. 489; Endlich on Interpretation of Statutes, page 673; People v. Admire, 39 Ill. 251; Liebers Hermeneutics, 156 ff; 8 R. C. L. 58.

In conclusion of this part of the argument and applying the principles laid down above, we submit that since it is impossible for the seller of gasoline to know when he may or he may not be guilty of a misdemeanor in performing an act, namely, the selling of gasoline, and since the law gives him no way of finding out the purpose to which the gasoline is to be put, and since he will be punished or not punished for doing something he can not possibly do—this act, must be held void for uncertainty. In its very nature this must be true of Act No. 606, because the test of the seller's guilt in the eyes of the law is the mental state of the buyer at the time the gasoline is bought. No way is given the seller to ascertain this mental state, yet he is required under punishment of the law correctly to ferret from the buyer for what purpose the gasoline is to be used, when the buyer himself either does not know or can not anticipate the future use of the gasoline.

VIOLATION OF DUE PROCESS OF LAW CLAUSE.

The Fourteenth Amendment to the Constitution of the United States, provides:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

We contend that Act No. 606 violates the above clause of the Federal Constitution, in that said act makes vendors of gasoline liable for the debts of another without the vendor's consent and without compensation, and in that said act makes said vendor subject to punishment or fine for the act of another committed without their connivance, consent or participation; and further, in that said act deprives said vendors of their property and appropriates it for public or private use, without just compensation.

Under this heading we assume for the sake of argument that the statute lays a privilege tax and that the Legislature has a right to levy such a tax. We, nevertheless, contend that the statute is void because it violates the due process of law clause of the Constitution of the United States. Reviewing the act again, it will be seen that if this is a valid tax upon the consumer of gasoline for the privilege of using the roads, as was held in the case of Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753; the seller is required to collect the tax and pay it to the treasurer of the county. No way is provided whereby the seller may collect the tax due to the State from the buyer. The seller is made a mere collection agency for the State, with no way to enforce payment, and yet becoming liable himself for failure to collect, and penalized for failure to pay the tax.

We submit that the reason given by the Supreme Court of Arkansas in the case of Standard Oil Company v. Brodie, *supra*, in holding that the seller of gasoline had an adequate remedy to enforce the collection of this tax by refusing to sell gasoline unless the tax was paid, is unsound; that to force the seller of gasoline to resort to the remedy pointed out in that case would also be a violation of the due process of law clause

of the Constitution of the United States for the effect would be to destroy the appellant's business of selling gasoline. We submit that it is beyond the authority of the State Legislature to prohibit the appellant, or any other citizen of the State of Arkansas, from engaging in the lawful business of selling gasoline and that to deprive the appellant of its right to engage in this business would also be taking property without due process of law.

The question, therefore, here is:

Has the State the power and right to require the seller of gasoline to collect a tax from the buyer without just compensation? We contend that the State has no such power, and that an attempt to exercise such power is in violation of the due process of law clause of the United States Constitution.

The term "due process of law" has as many meanings as there are classes of cases to which it may be applied. The term means one thing when applied to cases of eminent domain, another meaning when applied to cases of regulation, and still another when applied to cases of taxation for revenue. Even in cases of taxation for revenue the term has many different meanings, each depending upon the exact question involved.

In this case it is useless to speculate upon the meaning of due process of law in general or in other cases with totally different issues. In this case we are interested in the meaning of due process of law only in cases involving the question we have here raised. To this end we have directed our investigation, and upon this particular issue we have reviewed and cite decisions of the State and Federal Courts. The simple and plain question before the court is this: Is it or is it not a violation of the due process of law clauses of the State and United States Constitution to require the seller of gasoline to collect, without compensation, taxes due from a purchaser, providing the seller with no way of enforcing payment and making the seller pay it out of his own pocket if he can not collect from the buyer? We contend this is in direct violation of the due process of law clauses of the Constitution of Arkansas and the Constitution of the United States.

We trust counsel for appellees will face this issue squarely, and answer if they can, the seemingly unanswerable authority of the cases here cited deciding this identical proposition, which we submit sustains our contention that this act violates the due process of law clause of the Constitution of the United States.

It is a rule of law that as to corporations the State may lay a tax upon stockholders or the stock, and require the corporation to collect the tax and account for it, when the statute gives the corporation a lien upon the stock for reimbursement.

The first case of this kind in the United States Supreme Court was the case of National Bank v. Kentucky, 9 Wallace 353. In this case the State of Kentucky laid a tax of fifty cents upon each share of stock in any bank or moneyed corporation, said tax to be collected by the corporation, and upon failure of the corporation to collect, it should itself become liable for the tax together with twenty per cent penalty, and the charter of the bank might be forfeited for not complying with the act. The act also provided that the corporation should have a lien upon the stock for reimbursement. It was contended by the bank that all of its stock was invested in non-taxable United States securities. The court sustained the tax solely upon the ground that the statute had given to the bank a lien, the foreclosure of which would protect the bank and reimburse it for anything it had to pay on account of the tax due from the stockholders. The court said it was no more than a garnishment or attachment:

> "If the State of Kentucky had a claim against the stockholder of the bank who was a nonresident of the State, it could undoubtedly collect the claim by legal proceedings, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholders under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it."

It will be noted in this case the court decided that the statute did not violate the due process of law clause of the Con-

stitution, because it gave the corporation a lien on the stock for reimbursement. In the case at bar, there is no lien given to the seller and no other way or means provided for or suggested whereby the seller may be reimbursed for any tax that he is required to pay for the buyer.

There are many cases in the Federal Courts, as well as the State Courts, on this point, but they all turn upon the question of whether there is a means of reimbursement provided for when the collection agent has to pay what the taxpayer refuses to pay.

National Bank v. Hoffman, 93 Iowa 119.

R. R. v. Jackson, 7 Wall. 262.

U. S. v. R. R. Co., 17 Wall 326.

Stapylton v. Thaggard, 91 Fed. 93, 33 C. C. A. 353.

First Nat. Bank of Aberdeen v. Chehalis County, 166 U. S. 440.

Street Car Co. v. Morrow, 3 Pickle (Tenn.) 406.

Ottawa Glass Co. v. McCaleb, 81 Ill. 556.

Commonwealth v. R. R. Co., 186 Penn. 235.

First National Bank v. Lyman, 59 Kan. 410.

These cases are all explained in the case of Stapylton v. Thaggard, 91 Fed., at page 95. In this case the statute taxed the stock and made the bank the collection agency. The bank went into the hands of a receiver before any taxes on the stock had been paid by the holders thereof and before the bank had paid to the State any taxes due thereon. The question before the court was whether the claim of the State against the receiver for the bank, for the taxes, should be allowed. The court held that the claim should not be allowed, and said on page 95:

"As we construe the cases, from First National Bank v. Commonwealth, 9 Wall 353, to First National Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, the bank is made to pay the taxes assessed by the State against its shareholders, when the State statutes lay such duty upon the bank, *upon the theory* that the shares are valuable, *and that the bank has assets in its hands belonging to the shareholders from which it can recoup.* Where a bank is insolvent and has passed into the hands of a receiver, the shares are generally worthless; and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares. In such case, we are of the opinion that the tax assessed against the shares of the bank, can not be collected from the receiver, or from assets in his hands."

To the same effect, see Boston v. Beal, 55 Fed. 26.

The cases of Commonwealth v. R. R. Co., 186 Penn. 235, and First National Bank v. Lyman, 59 Kan. 410, are especially called to the attention of the court.

The rules of due process of law applicable to property taxation have no application here. About all that is meant by due process of law in property taxation is that before the tax is finally fixed upon property, there must be a valid assessment, notice of such assessment, and an opportunity afforded the taxpayer to contest the same. Evidently these rules would not apply if this is a privilege tax, because there is no assessment unless the act itself could be considered as an assessment. Even in such case the taxpayer should have opportunity upon notice to contest the validity of the tax or the amount thereof, before the tax is finally fixed. No such opportunity is given the taxpayer.

We take it, however, that the rules applicable to property taxation have no application here. We have been unable to find any case directly in point, and assume that the reason for this is that this form of taxation is extremely rare and that no State or few States have ever attempted to make one person collect taxes from another person without providing any means of reimbursement. It costs the appellant, as a seller, six hun-

dred ($600.00) dollars per month to file the reports, collect the tax and account for it. It is rendering a service to the State; it is not paid for it; it has no way of reimbursement. We submit that such a statute as this is in its essence and by its terms the taking of property without due process of law. We do not see how the State can require of its citizens to collect its taxes at expense to that citizen, without compensation, any more than it could require a citizen to build public buildings without compensation. Certainly the latter would be in violation of the law.

However, this may be, if a claim for taxes against a bank as collector from its shareholders, can not be allowed in insolvency proceedings, although the statute gave the bank a lien upon the stock for reimbursement. (Stapylton v. Thaggard, 91 Fed. 93), we do not see how the State can require the seller of gasoline to collect its taxes due from the buyer, at great expense to the seller, without any compensation therefor or without providing any way of compelling payment. This, however, is what the statute does, and we submit that it renders the whole act void.

DENIES EQUALITY OF THE LAWS.

Under this heading we assume for the sake of argument that the Legislature had power to levy such a tax; that it is definite and certain; and that it does not violate the due process of law clause of the Constitution of the United States. We contend here that if the act is valid in all other respects, it is nevertheless void because it is an unreasonable, arbitrary and oppressive discrimination against certain citizens or classes of citizens and by its very terms denies to the citizens of Arkansas equal protection of the law.

The Fourteenth Amendment of the Constitution of the United States provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law; nor *deny to any person within its jurisdiction the equal protection of the law.*"

The last clause of the above quotation is the one we invoke in this discussion.

The constitutional provision above quoted applies to all laws of the General Assembly whether dealing with privilege or property taxes. By the sweeping provisions of this clause, the General Assembly can not unreasonably discriminate between citizens of the State, whether in matters of taxation or other matters. See Waters-Pierce Oil Co. v. City of Hot Springs, 85 Ark. 509; 109 S. W. 293.

If the act in question grants to some citizens of Arkansas privileges and immunities which upon like terms are denied to other citizens in similar circumstances, then the act is void as in violation of the clause of the Constitution above quoted.

Looking to the act itself, it will be seen that a consumer of gasoline who makes his purchase of gasoline within the State of Arkansas is required to pay the tax; but that the citizen of Arkansas who buys his gasoline without the State does not have to pay the tax. Both of these citizens may use the same highways in the same kind of car, yet, according to this act the

former must pay the tax and the latter need not. It is conceded that there are many, many citizens of Arkansas living in border towns who go across the State line to purchase their gasoline to escape paying the tax, and that these citizens use the roads of Arkansas in the same manner, with the same kind of cars, as citizens who purchase their gasoline within the borders of this State. It will also be conceded that the seller of gasoline may ship gasoline into Arkansas from without the State and sell it in the original container to the consumer who uses it in combustible type engine in propelling motor vehicles over the highways of the State and still not be liable for this tax because this would be in interference with interstate commerce. We submit, that, in the first instance the consumer who purchases gasoline without the State is granted an immunity from taxation by the terms of this act which is not granted (but which is expressly denied) to citizens under precisely the same circumstances who purchase their gasoline within the State. We further submit that the seller of gasoline who purchased it without the State and shipped it into the State and sells it to the consumer in original container could not be required to answer for this tax. Western Oil Refining Co. v. Lipscomb, 244 U. S. 346.

We further submit that the making of the place of purchase of gasoline the determining factor in laying this tax is of itself unreasonable, arbitrary and discriminatory. If this act provides for a tax for the privilege of using the highways, as was held in the Standard Oil Co. v. Brodie, *supra*, then we see no escape from the conclusion that by its terms many citizens, an untold number, are not required to share a burden of taxation for the upkeep of public property which they enjoy upon the identical terms with others who are required to pay the tax. If this is true, we submit that the Federal Constitution has been violated by this act, because it denies equality of the laws.

In the case of Waters-Pierce Oil Co. v. City of Hot Springs, *supra*, the city of Hot Springs levied a tax of fifty dollars upon each oil wagon using the streets of Hot Springs, a tax of twenty-five dollars on all ice wagons, and ten dollars or less for all other kinds of vehicles using the streets. The court held that this ordinance was in direct contravention of the Constitution

in that it was an arbitrary discrimination against the owners of oil wagons, and granted to the owners of other wagons an immunity or privilege which was not granted to other citizens in the same circumstances and upon the same terms. We invoke the doctrine laid down in this case and submit that a discrimination in taxation because of the place where gasoline is bought, irrespective of where and how it is to be used, is necessarily an unreasonable and arbitrary discrimination.

It might be argued that the provision of the Constitution now referred to has no application because it applies only to natural persons and not to corporations. In answer to this, the act itself does not apply solely to corporations, but to all vendors or purchasers of gasoline for the purpose mentioned in the act, and we can not presume that corporations alone were meant to be taxed. See Waters-Pierce Oil Co. v. City of Hot Springs, 85 Ark. 514; Raymond v. Chicago Traction Co., 207 U. S. 20.

CONCLUSION.

In conclusion, we submit that Act No. 606 is void because it is uncertain and unreasonable; because it violates the due process of law clause of the Federal Constitution; because it is unreasonable, arbitrary and oppressively discriminatory; we therefore respectfully request the court reverse this case and perpetually enjoin the defendants, and each of them, from enforcing said act against the appellant.

Respectfully submitted,

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